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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1407

JAMES TRAINOR, *etc., et al.*,

Appellants,

v.

JUAN HERNANDEZ, *et al., etc.,*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF APPELLEES JUAN HERNANDEZ AND MARIA HERNANDEZ, individually and on behalf of all others similarly situated

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

QUESTIONS PRESENTED

1. Whether appellants can obtain any relief by this appeal because of the failure of the clerk and sheriff to appeal the injunction in favor of the plaintiff class enjoining all county clerks and county sheriffs in Illinois from execution of the Illinois Attachment Act.

2. Whether the trial court correctly concluded that the principles of equity, comity, and federalism did not compel the dismissal of a federal action brought on behalf of a class of plaintiffs challenging the Illinois Attachment Act and seeking to enjoin the classes of county clerks and county sheriffs throughout the state from enforcing the Act where the federal relief sought

could not be obtained in a pending state civil lawsuit against the named plaintiffs brought pursuant to the challenged Act.

3. Whether the Illinois Attachment Act comports with the due process requirements of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This class action was brought in federal district court pursuant to 42 U.S.C. §1983 challenging the constitutionality of the Illinois Attachment Act, Ill. Rev. Stat. ch. 11, §§1 *et seq.* and requesting declaratory and injunctive relief against its continued enforcement. (A. 28-49.) A three-judge court granted the relief requested and appellants filed this appeal pursuant to 28 U.S.C. §1253.

The Illinois Attachment Act authorizes a creditor with a money claim, whether liquidated or unliquidated and whether sounding in contract or tort, to obtain an attachment against the property of his alleged debtor either at the time of instituting suit or thereafter in any one of nine circumstances set forth in the Act (§1). (A. 22.) The creditor obtains a writ of attachment by filing a form affidavit with the clerk of the circuit court setting forth the nature and amount of claim, any one or more of the nine grounds for attachment and certain other information regarding the whereabouts of the debtor (§2). (A. 29.) Section 2a of the Act sets forth a sample affidavit which may be used by the creditor. (A. 30.) In all actions sounding in tort the creditor must first be examined by a judge concerning the cause of action and thereafter the judge endorses upon the

affidavit the amount of damages for which the writ shall issue (§2). (A. 30.) Except where an agency of the state is involved, the creditor is required to furnish bond in double the amount of the claim or double the amount of the property to be attached (§4a, 4b). (A. 31-32.)

Upon filing of the affidavit and posting the required bond the clerk issues the writ of attachment directing the sheriff to execute the writ and to serve it on the debtor (§§6, 8, 10). (A. 33-36.) The writ is made returnable on a return date designated by the creditor not less than ten nor more than sixty days after the date of the writ (§6). (A. 33.) The creditor need not file his complaint until ten days before the return date, and if he does not do so within five days after the return date the suit is subject to dismissal (§25). (A. 43.) The debtor is required to file his answer or otherwise make his appearance on or before the return date or fifteen days thereafter if the complaint has not been filed ten days prior to the return date (§25). (A. 43.)

Upon service of the writ the sheriff takes custody of the property or directs a third party in possession to withhold the attached property from the debtor (§§14, 21). (A. 38, 41.) The debtor can regain custody of his property prior to the trial on the creditor's claim in two ways. First, he can post a bond in double the value of the property attached, or in a sum sufficient to cover the amount of debt or damages alleged plus costs of the suit (§§14, 15). (A. 38.) Second, he can answer by affidavit denying the allegations set forth in the creditor's affidavit, and if the court finds for the debtor after a trial on the attachment issue, the writ will be quashed (§27). (A. 44.) If the debtor is unsuccessful in obtaining release of his property, it is held by the

sheriff or garnishee until the underlying claim is adjudicated.

On October 30, 1974 appellants[1] filed a complaint, affidavit for attachment, and writ of attachment and summons against plaintiffs Juan and Maria Hernandez[2] in the Circuit Court of Cook County, Illinois. (A. 9, 14-23.) All three documents were prepared on pre-printed forms supplied by the Clerk of the Circuit Court. (A. 14.) The complaint alleged that the plaintiffs had fraudulently concealed from the appellants funds on deposit in their credit union account and that as a result plaintiffs received public assistance for which they were not entitled. (A. 14.) The pre-printed affidavit contained a verbatim statement of the various grounds for attachment set forth in the Illinois Attachment Act. The appellants selected the seventh ground alleging that plaintiffs "within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors." (A. 17-18.) The writ of attachment and summons directed the sheriff of Cook County to attach the funds in the plaintiffs' credit union account and to summon the plaintiffs to appear

[1] Appellant Trainor is the Director of the Department of Public Aid and Appellant O'Malley verified the complaint and attachment affidavit as the agent of the Department. (A. 8-9.)

[2] The appellees in this Court include the named federal plaintiffs, Juan and Maria Hernandez, members of the plaintiff class, and the federal defendants Finley and Elrod and the classes of county clerks and sheriffs which they represent. For purpose of clarity therefore this brief will use the terms "plaintiffs," "plaintiff class" and "defendants Finley and Elrod" to designate the named federal plaintiffs, the plaintiff class, and the defendant-appellees, respectively.

in court on November 18, 1974 to answer the complaint. (A. 21-23.) These documents were summarily stamped by a clerk and delivered to the sheriff's office for execution. (A. 9.)

The writ of attachment was served upon the credit union on November 5, 1974 and plaintiffs were served with copies of the writ, complaint, and affidavit on November 8, 1974. (A. 9.) Consequently Juan Hernandez was unable to withdraw funds from his account on November 11 to pay outstanding debts immediately due and payable. (A. 9, 25.)

On November 18, 1974 Juan Hernandez appeared in the courtroom designated in the writ of attachment and requested an immediate hearing. He was informed that the case had already been continued to December 19, 1974, pursuant to a practice in that courtroom of setting hearings on attachments for thirty days subsequent to the return date. (A. 10, 25.)

Plaintiffs then brought this class action in federal district court on December 2, 1974 on behalf of themselves and all other persons similarly situated against the Clerk of the Circuit Court of Cook County and a defendant class of all clerks for the judicial circuits of Illinois, the Sheriff of Cook County and a defendant class of all Illinois county sheriffs, and against appellants Trainor and O'Malley as agents of the Department of Public Aid. (A. 5.) Plaintiffs asserted that the Illinois Attachment Act violates the due process clause of the Fourteenth Amendment in that it authorizes creditors to attach assets of debtors upon conclusory allegations of fraudulent conduct (§ 1, parts sixth through ninth), without supporting facts or evidence, without judicial order or supervision, and without prior notice and hearing or the opportunity for

an immediate post-seizure hearing. (A. 10-11.) Plaintiffs prayed that defendants be ordered to dismiss the writ of attachment and return their property and that defendants be enjoined from further execution and enforcement of the Act. (A. 12-13.)[3]

The plaintiffs then moved for a temporary restraining order that appellants dismiss the writ of attachment and that the defendant sheriff release control of their property. (A. 24.) In support of this request Juan Hernandez submitted an affidavit which averred that he and his wife had four minor children, that he had no other savings, and that he needed the money in the account to pay his rent, utility bills and an automobile repair bill, and to help support his family while he went to the hospital for surgery on his back. (A. 24-25.) These averments were not contradicted by the appellants. Appellants submitted affidavits that Juan Hernandez had hospitalization benefits and sick pay provided by his employer (A. 50), but no evidence was introduced as to the actual benefits he would receive in case of hospitalization. Appellants also submitted an affidavit which showed that plaintiff Maria Hernandez had been laid off on November 1, 1974. (A. 51.) No evidence was introduced by appellants regarding plaintiffs' current income or assets at the time of the attachment. No findings of fact or rulings were made on plaintiffs' motion because the parties reached an agreement whereby appellants agreed to release one-half of the attached funds. The parties also agreed to stay the state court proceedings pending resolution of the federal suit. (R. Item 22, p. 2; Item 26, p. 3.) The appellants ultimately dismissed the state suit.

[3] Plaintiffs also prayed for damages for deprivation of their civil rights. (A. 13.)

Appellants moved to dismiss (A. 55-56) and plaintiffs moved for summary judgment (A. 57) and for certification as a plaintiff and defendant class action (R. Item 17). A three-judge court was designated to hear these matters pursuant to 28 U.S.C. §2284 on March 21, 1975.

On October 31, 1975 the district court ordered that this suit be maintained as a plaintiff and defendant class action. (A. 63-64.) The court found that the plaintiffs represent the class of all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, §1 parts sixth through ninth, and that the plaintiff class meets all the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The court also found that defendants Finley and Elrod represent the class of clerks of the circuit courts of Illinois and the class of Illinois county sheriffs respectively, and that these classes meet the requirements of Rules 23(a) and 23(b)(1)(A) of the Federal Rules of Civil Procedure.

The district court entered its judgment and opinion on December 15, 1975. 405 F.Supp. 757. The court found that *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) did not prevent it from considering plaintiffs' constitutional claim since the Illinois Act is not "in aid of and closely related to criminal statutes." *Id.* at 760. And since the Act is "patently and flagrantly violative of the Constitution." *Id.* The court went on to declare the Act to be "on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 762. The court ordered defendants Finley and Elrod to release the property of

plaintiffs and members of the plaintiff class, enjoined defendants Finley and Elrod and the defendant class of clerks and sheriffs from issuing and executing writs of attachment pursuant to §1, subsections sixth through ninth of the Act, and enjoined appellants Trainor and O'Malley from authorizing and processing applications for attachments pursuant to those sections of the Act. The issue of damages was remanded to the single district judge for determination. (A. 67.) This issue has been continued pending resolution of this appeal. The appellants filed a motion for a stay of injunction pending appeal which was denied by the three-judge court on February 25, 1976, the Honorable Wilbur F. Pell, Jr., United States Circuit Court Judge, dissenting. (A. 81).

Appellants Trainor and O'Malley and defendants Finley and Elrod filed separate notices of appeal of the order of December 15, 1975. None of the parties appealed the class action order of October 31, 1975. Trainor and O'Malley perfected their appeal by filing a Jurisdictional Statement and this court noted probable jurisdiction on June 7, 1976. Finley and Elrod never perfected their own appeal, but instead have appeared in this court as appellees filing a brief in support of appellants' position.

SUMMARY OF ARGUMENT

I

This appeal reaches this Court in such a posture that no effective relief can be given the appellants. The three-judge district court enjoined the defendant classes

of Illinois county clerks and county sheriffs from issuing and executing writs of attachment against the plaintiff class of all persons who have had or will have their property attached pursuant to certain sections of the Illinois Attachment Act. Although the named clerk and sheriff filed a notice of appeal of this injunction, their appeal was never docketed and they appear in this Court as appellees. Therefore they cannot now ask this Court to vacate the injunction against the defendant classes. Nor can appellants, attachment creditors in the state court suit, appeal those portions of the injunction against the defendant classes in favor of those members of the plaintiff class whose property was or would have been attached by other creditors. Thus, regardless of the outcome of the present appeal, appellants could still not obtain prejudgment attachments, since the injunction against all clerks and sheriffs in Illinois must remain in full force and effect. Since there is no effective relief which appellants can obtain by this appeal, the appeal should be dismissed.

II

The principles of equity, comity, and federalism enunciated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) were fully respected by the three-judge court in reaching the merits of the constitutional claim. By doing so, the district court fulfilled its role as the primary guarantor of the plaintiffs' federal rights without interfering with or duplicating the state court proceeding and without reflecting negatively upon the state court's ability to enforce constitutional principles.

Federal injunctive relief was appropriate in the instant case since neither the named plaintiffs nor members of the plaintiff class had "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman v. Pursue, Ltd., supra* at 594. Resolution of the constitutional issue in the state civil collection suit would only have been binding on the parties to that proceeding but would not have protected the named plaintiffs or other members of the plaintiff class from continued utilization of the statute by any creditor in Illinois. Nothing would have prevented future attachments against the named plaintiffs or members of the plaintiff class who could only obtain a release of their property in the state court after the constitutional deprivation and the resulting irreparable injury had already occurred. Thus, a *Younger* dismissal of the federal action was not required since the threat to the plaintiffs' federally protected rights could not have been eliminated by the defense to a single state court suit. *Younger v. Harris, supra* at 46. Furthermore, because of the procedures for appealing decisions on attachments in Illinois, the constitutional issue would inevitably have become moot by a resolution of the suit on the money claim. Therefore, plaintiffs would not have had the opportunity to appeal an adverse ruling on the constitutional issue through the state appellate network and ultimately to this Court, a right equally as important as the right to raise the constitutional claim in the first instance.

In contrast to the state court collection suit brought by a single creditor against two joint debtors, the federal claim was brought pursuant to 42 U.S.C. §1983 against state officials charged with the execution of the Illinois Attachment Act. Section 1983 has been

characterized by this Court as a uniquely *federal* remedy against incursions by state authorities upon rights secured by the Constitution and laws of the United States and accordingly has been found to be an express exception to the proscriptions of the Anti-Injunction Act. Furthermore, in order to obtain relief for all persons similarly situated against the continuing operation of the Attachment Act, plaintiffs proceeded by way of a class action, a method which Congress established for vindicating the rights of large numbers of individuals in a single civil action. Therefore, only through a §1983 federal court suit could plaintiffs and members of the plaintiff class obtain complete, swift, and adequate relief against the continuing operation of the Attachment Act.

The federal injunction in no way interfered with pending state court litigation. Under *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Gerstein v. Pugh*, 420 U.S. 103 (1975) prejudgment attachment in Illinois in an extrajudicial proceeding, and an injunction against its maintenance will not affect the litigation on the merits of the underlying civil collection suit. The appellants and the state court itself were always free to proceed with the pending suit on the appellants' money claim.

Unlike *Younger* and *Huffman*, the federal injunction did not disrupt the state's efforts to enforce its criminal laws. Attachment is a general creditor's remedy, designed to facilitate collection of a possible judgment on a money claim. Attachment itself is not a criminal proceeding, nor is it related in any way to Illinois' criminal laws. Furthermore, as the court below noted, it is mere happenstance that the state was the attachment creditor in the pending civil suit, for under the

Attachment Act any creditor, public or private, can obtain an attachment in conjunction with any type of money claim. The existence of a plaintiff class consisting of numerous persons whose property had been attached by private creditors for ordinary civil claims underscores the general civil nature of the Attachment Act.

The federal court suit did not result in a duplication of the state legal proceedings. Since attachment is an extrajudicial proceeding, the resolution of the constitutional issue in federal court did not duplicate pending or completed proceedings in the state court. Furthermore, because protection for the plaintiffs and the plaintiff class against the continued operation of the Attachment Act could not have been obtained by defending the state collection suit, the federal suit for class injunctive relief against the state officials charged with executing the Act did not duplicate the state court proceeding. On the contrary, the federal suit has prevented a multiplicity of state suits by resolving the claims of all members of the plaintiff class in a single suit. For similar reasons the federal court action did not reflect negatively on the state court's ability to enforce constitutional principles since the state court could not have afforded the plaintiffs or the plaintiff class complete relief in the collection suit pending before it.

Finally, as the district court found, the Illinois Attachment Act is patently and flagrantly violative of the Constitution. This factor, along with the others set forth above, clearly justified the federal court's decision to reach the constitutional merits of this case.

III

After reviewing the decisions of this Court regarding the constitutionality of creditors' remedies, the court below concluded that due process requires either notice and a hearing prior to summary seizure of a debtor's property or alternative procedural safeguards such as those approved by this Court in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). The district court correctly found that the Illinois Attachment Act is patently violative of the due process clause since it neither provides for prior notice and hearing, nor does it provide three crucial safeguards to protect the debtor from a wrongful seizure of his property.

First, unlike the seller in *Mitchell*, the Illinois attachment creditor need not set forth specific facts in his affidavit which would entitle him to a writ of attachment. Instead, a writ will automatically issue upon conclusory allegations in verbatim statutory language on a pre-printed form supplied by the clerk of the court. The requirement for specific facts is especially crucial where, as in the instant case, fraud is alleged as grounds for the attachment so that a judicial officer can evaluate whether the specific elements of fraud have been properly alleged and so that the debtor is apprised of the facts he will have to rebut at any post-seizure hearing.

Second, a creditor need not present a factual affidavit to a judge for a determination of whether a writ shall issue, but instead a writ will automatically issue from a clerk of the court who has no authority to determine the legal sufficiency of the creditor's allegations. Judicial scrutiny of the affidavit is particularly important in a complex case such as fraud where a

ministerial officer would be unable to determine whether the proper factual elements of fraud have been alleged.

Finally, and most significantly, the Attachment Act contains no express provision for an immediate post-seizure hearing which would cut to a bare minimum the length of an ex parte seizure. The creditor can set the return date of the writ anywhere from ten to sixty days after its issuance and the court, as in the instance case, may set the hearing on the attachment well after the return date. There is no provision in the Attachment Act which would allow the debtor to move for an earlier hearing, and the ultimate date of the hearing is solely up to the discretion of the court. Under these circumstances an express provision for an immediate post-seizure hearing is necessary for the proper protection of the debtor's interests.

The absence of these safeguards against a wrongful seizure of property is especially serious in the instant case where an unsecured creditor has virtually unlimited power to seize any and all goods of an alleged debtor for any type of money claim. Unlike the seller in *Mitchell* the attachment creditor is not limited to seizure of goods in which he has an uncontested security interest. The impact on the debtor in such a case can indeed be severe, especially where the debtor may not be able to obtain a bond for the release of his property. In light of these considerations, it can be seen that the Illinois Attachment Act does not afford a proper constitutional accommodation between the interests of the creditor and the debtor, but instead clearly fails to provide the debtor with adequate procedural safeguards against the arbitrary seizure of his property.

ARGUMENT

I.

SINCE THE CLERK AND SHERIFF HAVE NOT APPEALED, THE INJUNCTION AGAINST ALL THE COUNTY CLERKS AND SHERIFFS IN ILLINOIS IN FAVOR OF THE PLAINTIFF CLASS MUST STAND REGARDLESS OF THE OUTCOME OF THE APPEAL OF TRAINOR AND O'MALLEY.

On October 31, 1975, prior to the decision of the three-judge court, the district court ordered that this suit could proceed on behalf of a class of plaintiffs subject to certain sections of the Attachment Act against the defendant classes of county clerks and sheriffs throughout Illinois.[4] Subsequently the three-judge court enjoined the defendant classes of county clerks and sheriffs from issuing and executing writs of attachment against the plaintiff class and ordered them to cause the release of all property of the plaintiff class currently subject to attachment. (A. 66.) The court also enjoined appellants Trainor and O'Malley from authorizing and processing applications for writs of attachment against the plaintiff class. (A. 66.) This provision of the injunction is superfluous since the only persons

[4]The court properly ruled on plaintiffs' motion for class certification prior to a ruling on the merits by the three-judge court. Rule 23(c)(1) Federal Rules of Civil Procedure. *See, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974). Furthermore, since a three-judge court is required to dismiss under *Younger*, [*Steffel v. Thompson*, 415 U.S. 452, 475 n.7 (1974)] that issue was properly decided by the three-judge court after class certification by the single judge.

authorized to execute the Attachment Act are enjoined from doing so.[5]

Defendants Finley and Elrod and appellants Trainor and O'Malley filed separate notices of appeal of the court's judgment. (A. 79-80.) Finley and Elrod never docketed their appeal by filing a jurisdictional statement and therefore it is subject to dismissal under United States Supreme Court Rule 14(3). *See, Shapiro v. Doe*, 396 U.S. 488 (1970). Nor have they joined the appellants in the present appeal but instead have appeared as appellees and have filed a brief supporting appellants' position. Since Finley and Elrod have not docketed their appeal, they cannot now ask this Court to vacate the injunction against the defendant classes of clerks and sheriffs. *See, Swarb v. Lennox*, 405 U.S. 191, 201 (1972).

Appellants Trainor and O'Malley purport to appeal the entire order of the three-judge court, including those portions of the order directed solely against the classes of county clerks and sheriffs in favor of the plaintiff class. It is clear, however, that a party may only appeal a judgment which is directed against him. *Seaboard Surety Co. v. United States*, 306 F.2d 855 (9th Cir. 1962); *Milgram v. Loew's, Inc.*, 192 F.2d 579

[5]Trainor and O'Malley are not the state officers charged with the execution and enforcement of the Attachment Act but are sued in the posture of attachment creditors who utilized the Act as any other creditor, public or private. Thus the injunction against them could have been issued by a single judge. The three-judge court was required to issue the injunctions against Finley and Elrod since the clerk and sheriff are specifically required by the Illinois Act to carry out its provisions. 28 U.S.C. §2281. Since Finley and Elrod did not appeal the decision of the three-judge court, it is questionable whether this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.

(3rd Cir.) *cert. denied*, 343 U.S. 929 (1951); *Spriggs v. Stone*, 174 F.2d 671 (D.C. Cir. 1949); *Stearns-Roger Mfg. Co. v. Brown*, 114 F. 939 (8th Cir. 1902). The plaintiff class consists of numerous persons throughout Illinois who have had or will have their property attached by any creditor, not merely by the appellants. These members of the plaintiff class acquired a separate legal status when the class was certified by the district court. *See, Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Appellants cannot appeal the injunctions entered in favor of these class members against other parties to the litigation who have not appealed and particularly have no standing to appeal a judgment in favor of those members of the class whose property was attached by other creditors. Regardless of the outcome of the present appeal, then, the injunction against the defendant class members must stand.[6]

In the light of the above considerations there is no effective relief which appellants can obtain by this appeal. Even if Trainor and O'Malley were to prevail on the appeal of the injunction against them, they could still not obtain prejudgment attachments since all clerks

[6]Even if this Court found that equitable relief was not proper in light of *Younger* and *Huffman*, this would not affect the injunction against Finley and Elrod. *Younger* is not a jurisdictional issue since this Court has allowed the parties to waive it. *See, Sosna v. Iowa*, 419 U.S. supra at 396, n.3; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 595 n.1; 420 U.S. at 613, n.1 (Brennan, dissenting). Failure to appeal an order should be construed as a waiver of all non-jurisdictional issues. Since there is no question that the court had jurisdiction pursuant to 28 U.S.C. §1343(3), the injunction against Finley and Elrod must stand. Finley and Elrod's appellees' brief in support of appellants' position on the *Younger* issue comes too late to affect the judgment against them.

and sheriffs of Illinois are enjoined from issuing and executing writs of attachment. Therefore this court should not exercise its jurisdiction and this appeal should be dismissed.

II.

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PRINCIPLES OF EQUITY, COMITY, AND FEDERALISM EXPRESSED IN *YOUNGER V. HARRIS* AND *HUFFMAN V. PURSUE, LTD.* DID NOT BAR FEDERAL RESOLUTION OF THE CONSTITUTIONAL ISSUES IN THE INSTANT CASE.

The three-judge court below recognized that principles of equity, comity, and federalism as enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), had to be taken into account in deciding whether the federal court should resolve the constitutional issues presented in the class action complaint. After considering these principles, the court concluded that dismissal of the instant case was not required because (1) the Illinois Attachment Act was not in aid of and closely related to criminal statutes and (2) the Illinois Attachment Act was "patently and flagrantly violative of the constitution." 405 F.Supp. at 760. For these reasons, and also based upon additional considerations not discussed by the trial court, plaintiffs submit that the principles of equity, comity, and federalism were fully respected by the trial court's decision to hear and decide the constitutional claim. On the other hand, a ruling that

the trial court should have dismissed the complaint would truly "turn federalism on its head." *Steffel v. Thompson*, 415 U.S. 452, 457 (1974).

A. There is an overriding federal interest in vindicating the plaintiff class' §1983 claim for state-wide injunctive relief against unconstitutional deprivation of their property rights.

The principles of comity and federalism enunciated by this Court in *Younger v. Harris* take cognizance of the legitimate interests of both state and federal governments. 401 U.S. at 44. Thus, any analysis of these respective interests must take into account the strong interest of the federal government in vindicating the constitutional rights of its citizens, especially in the instant case of a §1983 claim for state-wide class relief against unconstitutional deprivations of property rights. Plaintiffs claim that the district court below fulfilled its role as a primary guarantor of federal rights without interference with state judicial functions.

At the outset of this analysis the different nature of the state and federal court proceedings must be kept in mind. The state court proceeding was a collection suit brought by a single creditor against two debtors in which the creditor obtained a prejudgment attachment

of the debtors' assets pursuant to the Illinois Attachment Act.[7] Had the attachment debtors been able to successfully attack the constitutionality of the Attachment Act in state court, they would have eventually obtained a release of their property. However, the decision of a circuit court trial judge is not binding on any other judge in Illinois. Therefore, neither these debtors nor any other debtors in Illinois would be protected against future attachments by this creditor or any other creditors utilizing the Attachment Act.

The federal lawsuit, on the other hand, was brought by a class of debtors and potential debtors throughout the state against two classes of state officials in all of Illinois' counties who were charged under the Attachment Act with carrying out its provisions.[8] The suit was brought pursuant to 42 U.S.C. §1983 which this Court has characterized as "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of

[7]Throughout their brief appellants imply that as state officials they are entitled to special considerations. By doing so they attempt to obfuscate the real issues in this case. Although the plaintiff in the collection suit was the Illinois Department of Public Aid, it utilized a prejudgment remedy available to all creditors, and therefore for purposes of both the *Younger* and constitutional issues occupy the status of any other creditor. As the court below noted, "it is mere happenstance that the State of Illinois was the petitioner in the attachment proceedings." 405 F.Supp. at 760.

[8]While the appellants were also named as defendants in the federal suit, injunctive relief against them was not necessary to stop the operation of the Attachment Act. See discussion *supra* at 8.

the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Section 1983, along with other Reconstruction era legislation established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Id.* at 239, and in conjunction with the Judiciary Act of 1875[9] constituted the lower federal courts as "the *primary* and powerful reliance for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).[10] Accordingly, §1983 has been the common vehicle for constitutional challenges to state summary creditor remedies and the federal courts have consistently reached the merits of the plaintiffs' claims even though there were pending state court proceedings. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125 (8th Cir. 1975); *United States General, Inc. v. Arndt*, ___ F.Supp. ___ (No. 75-C-204, E.D. Wisc. August 4, 1976); *Hutchison v. Bank of North Carolina*, 392 F.Supp. 888 (M.D. N.C. 1975); *Bunton v. First Nat'l Bank of Tampa*, 394 F.Supp. 793 (M.D. Fla. 1975); *Douglass Research and Chemical, Inc. v. Solomon*, 388 F.Supp. 433 (E.D. Mich. 1975); *Garcia v. Krausse*, 380 F.Supp. 1254 (S.D. Tex. 1974) *rev'd on other grounds*, 534 F.2d 609 (5th Cir. 1976); *Manning v. Palmer*, 381 F.Supp. 713 (D. Ariz. 1974).

[9]18 Stat. 470. That Act gave general federal question jurisdiction to the federal courts. *See*, 28 U.S.C. §1331.

[10]It was these considerations which led this Court to find §1983 to be an "expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C. §2283. *Mitchum v. Foster*, 407 U.S. at 238-243.

In addition to stating a federal claim under §1983 the plaintiffs utilized a method provided by Congress for remedying widespread constitutional deprivations–the class action. Pursuant to Rule 23 of the Federal Rules of Civil Procedure the plaintiffs brought this suit on behalf of all other debtors and potential debtors in Illinois subject to the challenged sections of the Attachment Act. (A. 6-7.) Based upon the evidence the district court found that the plaintiff class satisfied all the requirements of Rule 23(a) and 23(b)(2). (A. 63.) Class injunctive relief against the clerk and sheriff of Cook County, however, would have only prevented prejudgment attachments in that county. Since there are one hundred and one counties throughout Illinois, plaintiffs moved for certification of defendant classes to prevent "inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Rule 23(b)(1)(A), Federal Rules of Civil Procedure. (A. 7.) The district court found the defendant class to meet the requirements of 23(a) and 23(b)(1)(A). (A. 64.) This order has not been appealed and therefore the court's finding cannot be challenged on appeal.

The class action is the method which Congress established for vindicating the rights of large numbers of individuals through a single civil action. *See*, 7 Wright and Miller, *Federal Practice and Procedure*, §1751 (1972). It is now generally recognized that Rule 23(b)(2) is specifically designed for obtaining equitable relief in civil rights cases. Advisory Committee's Note 28 U.S.C.A. Rule 23(b)(2) at 298-299. *See*, 7A Wright and Miller, *supra*, §1771 at 663; *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975); *Fujishima v.*

Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972). Appropriately, numerous federal courts have authorized §1983 plaintiff and defendant class action in constitutional attacks on creditors' remedies. *See, e.g., Gibbs v. Titelman*, 369 F.Supp. 38, 51-53 (E.D. Pa. 1973), *rev'd on other grounds* (3rd Cir.) 502 F.2d 1107, *cert. denied*, 419 U.S. 1039 (1974) (self-help repossession statute–plaintiff and defendant classes); *Lynch v. Household Finance Corp.*, 360 F.Supp. 720, 722 n.3 (D.Conn. 1972), *on remand from* 405 U.S. 538 (1972) (prejudgment attachment and garnishment statute–plaintiff class of persons subject to statute, defendant class of creditors);[11] *Reeves v. Motor Contract Co. of Georgia*, 324 F.Supp. 1011 (N.D. Ga. 1971) (prejudgment wage garnishment statute–plaintiff class of state residents subject to statute; *Santiago v. McElroy*, 319 F.Supp. 284 (E.D. Pa. 1970) (distress for rent statute–plaintiff class of low-income consumers); *Swarb v. Lennox*, 314 F.Supp. 1091 (E.D. Pa. 1970) *aff'd* 405 U.S. 191 (1972) (confession of judgment statute–plaintiff class of state residents earning less than $10,000 per year).

Thus, in contrast to the state court suit for a money claim by a single creditor against joint debtors, the federal suit involved a uniquely federal claim for class relief against state officials pursuant to §1983 and Rule 23 of the Federal Rules of Civil Procedure. The district court's ruling is a classic example of federal relief against widespread constitutional deprivations by state authorities.

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[11]The Connecticut statute struck down in *Lynch* is similar to the Attachment Act being challenged here. See discussion *infra* at 30-31.

B. Federal injunctive relief was necessary to prevent great and immediate irreparable injury to plaintiffs and members of the plaintiff class.

A person whose property is attached pursuant to the Illinois Attachment Act faces irreparable injury which is both "great and immediate." *Younger* at 46. The injury which results is not merely "the cost, anxiety, and inconvenience" of litigation, which this court has found insufficient to justify federal injunctive relief. *Id.* The injury is the very real and tangible loss of one's property and the economic and social consequences resulting therefrom. This loss is truly immediate–it occurs the moment the writ of attachment is served and the debtor is denied access to his property. The injury begins before the debtor has been able to interpose any defense and results "from the very bringing of the state proceedings." *Younger* at 56 (Stewart, concurring).

That prejudgment attachment can have a severe and immediate impact upon the debtor can be seen from the case of the named plaintiffs. At the time of the attachment Mrs. Hernandez had just been laid off from her job. (A. 51.) Mr. Hernandez had to rely on his sole income as a laborer to support his wife and four minor children. There were numerous current expenses and outstanding bills to pay, including rent and utilities. (A. 25.) Furthermore, Mr. Hernandez needed to take off from work for surgery on his back. While his employer provided some hospitalization and sick leave benefits, it was not clear how long he would have been away from his job and whether these benefits would have covered his expenses. The plaintiffs' only savings was the money they had accumulated in their credit union account at

work by authorizing deductions from their paychecks. At the time they most needed their savings they were denied access without notice. Clearly great and immediate injury could have occurred had the federal court not intervened.[12]

It should also be pointed out that this court has refused to vary the requirements of due process depending on the nature of the property seized or the potential economic impact on the debtor. *See, Fuentes v. Shevin, supra* at 89-90; *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601, 608 (1975). Thus, any significant taking of property without constitutional safeguards is likely to result in irreparable injury. *North Georgia Finishing* at 608. Furthermore, regardless of the actual economic impact upon a debtor resulting from an attachment, the deprivation of one's constitutionally protected property rights must be seen as irreparable *per se* since "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes v. Shevin, supra* at 82.

Although no court could rectify the injury which had already occurred, plaintiffs turned to the federal court to obtain a release of their property to prevent future deprivations of their constitutionally protected property rights and to obtain similar relief for persons similarly situated. A federal remedy for precisely this type of claim had been provided by Congress in §1983 and Rule 23 of the Federal Rules of Civil Procedure, and plaintiffs relied upon the ample federal precedent in

[12] As a result of the settlement of the motion for a temporary restraining order plaintiffs received half of their funds, or approximately $600 which greatly alleviated their economic plight.

identical cases for obtaining swift relief. As a result of the federal suit plaintiffs obtained a release of one-half of their property within one month and a state-wide injunction on behalf of the class in one year.[13] Thus, the federal courts afforded plaintiffs and members of the plaintiff class a complete, adequate, and swift remedy for their federal claim.

C. Neither plaintiffs nor members of the plaintiff class had an adequate remedy for their federal claim in the pending state court proceedings.

The necessary predicate for a *Younger* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman* at 594. Plaintiffs claim that such an opportunity did not exist in the present case because (1) the threat to the federally protected rights of both the named plaintiffs and the plaintiff class could not be eliminated by the defense of a single suit; and (2) an appeal of the constitutional issue through the state appellate court system and ultimately to this Court would inevitably become moot.

[13]Appellants claim that had plaintiffs raised their constitutional objections in state court they would have had a hearing on December 19, 1975, one year before the federal decision. (Apps. Br. 20.) Appellants fail to recognize that the constitutional issue would have to be briefed and a decision might not be rendered for many months. Furthermore, after one year in federal court plaintiffs obtained state-wide class relief whereas any state court decision would only have been binding on the parties.

1. Resolution of the constitutional claim in the pending state proceeding would not protect plaintiffs or members of the plaintiff class from the continuing operation of the Attachment Act.

Federal deference to state court proceedings is not required when "the threat to the plaintiffs' federally protected rights . . . cannot be eliminated by his defense against a single prosecution." *Younger* at 46. Plaintiffs contend that federal injunctive relief was appropriate in the instant case since neither the plaintiffs nor the members of the plaintiff class could eliminate the threat to their federally protected rights by raising their constitutional claim as a defense in the pending state court suit.

If plaintiffs had successfully raised the constitutional issue in the pending collection suit against them, the resolution of that issue would be *res judicata* only between the plaintiffs and appellants. Furthermore, the decision of a circuit court judge has no *stare decisis* effect on any other judge in Illinois. Consequently, the resolution of the constitutional issue in the pending suit would not protect the plaintiffs from future attachments by other creditors, nor would it protect members of the plaintiff class from attachment by any creditor including appellants.[14]

Plaintiffs might have attempted to obtain an injunction against continued operation of the Attachment Act by filing a third party claim against the

[14]In a criminal prosecution, resolution of a constitutional issue would at least protect the state defendant since that court's ruling would be *res judicata* between the defendant and the state, the only party which can bring a criminal action. In contrast, any alleged creditor can obtain a prejudgment attachment in Illinois.

sheriff or clerk in the pending civil suit.[15] Alternatively plaintiffs might have filed a separate suit for injunctive relief.[16] The possibility of maintaining a third party suit or a separate suit in state court, however, does not require federal restraint. *Younger* only requires dismissal of the federal suit where the threat to federally protected rights can be eliminated by the *defense* of a *single* state court suit. *Id.* at 46. Comity and federalism could not possibly require an *affirmative* action either by filing a separate suit or even by filing a third party complaint. Such a result would not effectuate the *Younger* policy of avoiding a duplication of legal proceedings and would be contrary to this Court's pronouncement that under §1983 a plaintiff need not exhaust his state remedies before applying to the federal courts for relief. *See, Monroe v. Pape*, 365 U.S. 167 (1961).

[15]Leave to file such a third party claim is up to the discretion of the court. Ill. Rev. Stat. ch. 110, §25(1). Furthermore, denial of leave to file such a complaint is an interlocutory order and can only be appealed by permission of the trial and appellate courts. *See*, Illinois Supreme Court Rule 308, Ill. Rev. Stat. ch. 110A, §308.

[16]While under the Illinois Civil Practice Act there has been a merger of law and equity (*see*, Ill. Rev. Stat. ch. 110, §31) the Circuit Court of Cook County has retained that traditional distinction for purposes of case assignment. The collection suit in the instant case was assigned to the Municipal Department which hears civil claims at law for less than $15,000 and proceedings ancillary and supplementary thereto. General Order No. 1, §2.2(h), Circuit Court of Cook County (1972). Suits for injunctive relief, class actions, and similar equitable claims are assigned to the County Department, Chancery Division. General Order No. 1, §2.1. Thus, had plaintiffs filed a suit for the injunctive relief in state court, their suit would not have been assigned to the municipal judge hearing the collection case but to a state chancellor.

It must also be kept in mind that in addition to the named plaintiffs and members of the plaintiff class currently subject to an attachment, the plaintiff class consists of many persons whose property had not been attached at the time of certification but who were subject to attachment at any time without prior notice. These persons have a separate legal status apart from the named plaintiffs and their interests are similarly worthy of protection. *See, Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). These class members, however, did not have "the opportunity to raise and have timely decided the federal issues involved," *Huffman* at 594, since they were not involved in any state proceedings at the time the class was certified.[17] Requiring these class members

[17]Relief for these class members could not have been obtained in the pending state attachment suit against the named plaintiffs. To obtain such relief plaintiffs would have had to file a third party plaintiff class action against two classes of third party defendants. Such an action, however, is without precedent in Illinois and could not proceed under existing case law. *See, e.g., Johnson v. Moon*, 3 Ill. 2d 561, 569, 121 N.E.2d 774, 778 (1954). Furthermore, it is not at all clear that a plaintiff and defendant class action could be maintained in the state courts. Illinois has no class action rules and the Federal Rules have not been used as a guideline. *See, e.g., Pearlman v. First Nat'l Bank of Chicago*, 15 Ill. App.3d 784, 305 N.E.2d 231 (1973). The courts have had broad discretion in this area and no clear cut rules have emerged. *See*, Tornquist, *Roadmap to Illinois Class Actions*, 5 Loyola U.L.J. 45, 46-49 (1975). Defendant class actions do not seem to be allowed at all. *Rubloff and Co. v. Leaf*, 347 Ill. App. 191, 196, 106 N.E.2d 735, 735 (1952); *Gaffney v. Shell Oil Co.*, 19 Ill. App.3d 987, 312 N.E.2d 75[illegible] 759 (1974). *See*, Tornquist, *supra* at 74 n.19. Even if such an action could be maintained, however, it would not satisfy the requirement of a *Younger* dismissal.

to await until they are subject to an illegal attachment before their federal rights can be vindicated is surely not required by comity and federalism. *See, Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974).

In *Gerstein v. Pugh, supra,* this court recognized the role of the federal courts in providing protection against continuing constitutional deprivations to both the named federal plaintiffs and to unnamed members of the plaintiff class, even after the immediate threat to the named plaintiffs' rights has disappeared. *Gerstein* was a class action challenge to pretrial detention on an information of a prosecutor without a hearing before a judge. Before the case on the merits was resolved by the Court, the named plaintiff had been convicted, thereby mooting his claim that his pre-trial detention was improper. This Court found that the claim was nonetheless still live for the unnamed class members. The Court noted that although the named plaintiff's pre-trial detention had ended, he "could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." *Id.* at 110 n.11.

Similarly, in the instant case, although the named plaintiffs might regain their property in the state court proceeding, they "could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be (subject to) the allegedly unconstitutional procedures." *Id.* Since the release of the property by the state court would not have protected either the named plaintiffs or the plaintiff class from continuing deprivations, federal injunctive relief was appropriate.

Absent the opportunity to have the federal claim vindicated in the pending state proceeding, federal

injunctive relief "does not result in duplicative legal proceedings" nor does it "reflect negatively upon the state court's ability to enforce constitutional principles." *Steffel v. Thompson*, 415 U.S. 452, 462. *See, Huffman* at 602-604. Since class injunctive relief could not have been obtained in the state court suit, the federal suit did not result in a duplication of those proceedings. On the contrary, the federal suit has actually prevented a multiplicity of state proceedings. Without class injunctive relief, each attachment debtor would have had to raise his constitutional claim in a separate proceeding after his property had been attached. This is not only a burden upon each individual debtor, it would also put a great burden on the state courts. It would take hundreds of suits in the state courts to bring about the result reached in one federal class action. Thus, only the federal court provided plaintiffs and the plaintiff class with "a single suit . . . adequate to protect the rights asserted." *Younger*, 401 U.S. at 44. Cf. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952).[18]

[18]Two lower federal courts have recognized the role of federal class actions in avoiding a duplication of state legal proceedings. In *Garrett v. Bamford*, 538 F.2d 63 (3rd Cir. 1976) the court found that the Tax Injunction Act, 28 U.S.C. §1341, did not bar federal jurisdiction over a class action attack against allegedly unconstitutional state tax assessments where the state remedy was clearly designed for the individual taxpayer to appeal his individual assessment. The court noted that a federal class action would avoid the expense, inconvenience, and inefficiency of separate actions at law in the state court. In *Owens v. Housing Authority of City of Stamford*, 394 F. Supp. 1267, 1271 (D. Conn. 1975), the court found that *Younger* and *Huffman* did not bar a federal class action attack on public housing eviction procedures since, *inter alia*, the federal suit would avoid duplicative legal proceedings in each of the housing authorities' state eviction cases.

Finally, federal injunctive relief in the instant case does not reflect negatively upon the state court's ability to enforce constitutional principles, since the state court could not have afforded the plaintiff or the plaintiff class complete relief in the collection suit pending before it.

2. Plaintiffs and members of the plaintiff class did not have an adequate remedy in the state courts since any appeal of the constitutional issue would ultimately have become moot.

Federal deference to the state courts not only presumes that there is a timely opportunity to raise the constitutional issues in the pending state proceeding, but further that any adverse ruling can be appealed through the state appellate network and ultimately to this Court. *See, Huffman* at 605-606, 608-609. *Accord, Lessard v. Schmidt*, 413 F.Supp. 1318 (E.D. Wisc. 1976) *on remand from* 421 U.S. 957 (1975). The opportunity for ultimate review by the Supreme Court is essential for a full and complete hearing on all federal and constitutional issues. Appellate review is also crucial in the instant case since only a decision by the Illinois or United States Supreme Court will have *stare decisis* effect throughout Illinois and thus protect the rights of plaintiffs and the plaintiff class against continuing operation of the Attachment Act. However, because of the cumbersome procedure for appealing attachments in Illinois, the constitutional issue is virtually certain to become moot before appellate review is completed.

In Illinois, rulings on matters relating to attachment must be appealed pursuant to Illinois Supreme Court Rule 304(a), Ill.Rev.Stat. ch. 110A, §304(a). *Smith v.*

Hodge, 13 Ill.2d 197, 148 N.E. 2d 793 (1958). *Accord, American Mrtg. Corp. v. First Nat'l Mrtg. Co.*, 345 F.2d 527, (7th Cir. 1965). Rule 304(a) provides *inter alia* that final judgments as to fewer than all the claims in a lawsuit can only be appealed if the trial court makes an express written finding that there is no just reason for delaying appeal. Thus, if the court refused to make such a finding, any ruling on the constitutionality of the attachment procedure must await final judgment on the merits of the creditor's claim.[19] At this point however the constitutional issue becomes moot, for if the debtor prevails on the merits the attachment is dissolved, while if the creditor prevails the attached property becomes available for execution[20] (§34 of the Act, A. 46). Since there is normally no liability for good faith use of a statute not yet found to be unconstitutional, there is no remaining damage issue to save the case from mootness. *See, Tucker v. Maher*, 497 F.2d 1309 (2nd Cir. 1974).[21]

If the Court does make the requisite finding under Rule 304(a), the order is appealable as a final, not an interlocutory, judgment. There is thus no provision for a stay of the proceedings on the creditor's claim and the appeal would not follow an expedited briefing schedule as in the case of an interlocutory appeal.

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[19]A finding of appealability under Rule 304(a) is purely discretionary and there is no provision for review of an abuse of discretion when a finding is refused. *E.M.S. Co. v. Brandt*, 103 Ill. App.2d 445, 743 N.E.2d 695 (1968).

[20]An appeal bond would only stay execution if the debtor appealed from the judgment against him on the underlying claim.

[21]State law issues regarding proper use of attachment procedures would not be mooted since the Act provides damages for wrongful attachment.

Compare, Illinois Supreme Court Rules 304(a), 326 and 343 *with* Rules 307 and 308. Consequently the merits of the underlying claim would ordinarily be resolved and the constitutional issue mooted before that issue was decided by the appellate court, and certainly before the case reached the Illinois or United States Supreme Court.[22]

Given the right combination of circumstances, it is possible that the constitutional issue might eventually reach the higher appellate courts. However, such a result is highly unlikely in light of existing Illinois case law. This Court has previously pointed out that the Tax Injunction Act[23] will not deprive a federal court of jurisdiction over a federal claim to enjoin state tax procedures if the availability of an adequate state remedy is uncertain. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951); *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946). *Accord, Garrett v. Bamford*, 538 F.2d 63, 67 (3rd Cir. 1976). The uncertainty of a complete, swift, and adequate remedy in the instant case should similarly justify federal court action to stop an immediate and

[22]In *Mitchell v. W. T. Grant Co.*, 417 U.S. 600 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), where constitutional attacks on prejudgment property seizures reached this Court via the state appellate process, there were immediate interlocutory appeals of the constitutional issues with a stay of proceedings on the underlying claim. For *Mitchell, see*, La. Code Civ. Proc. Ann. Art. 2201, form 1495. For *North Georgia, see*, 231 Ga. 260, 201 S.E.2d 321 (1973); Ga. Code Ann. §6-701(3) and §24-3636.

[23]28 U.S.C. §1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

continuing deprivation of property under a patently unconstitutional statute.

In summary, then, the Illinois courts did not provide the necessary predicate for a *Younger* dismissal–"the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Huffman* at 594. By raising the constitutional issue in the pending state court suit the plaintiffs could not have prevented future unconstitutional deprivation of their property, nor would the other members of the plaintiff class be protected against such deprivations. Class injunctive relief against the defendant classes of state officials could only be obtained, if at all, by filing a separate suit in state court, not by raising the federal issue as a *defense* to the appellants' money claim. The remote possibility of an eventual appeal to the United States Supreme Court certainly does not satisfy the requirement of a *timely* hearing, especially where plaintiffs and the plaintiff class will continue to be subject to wrongful attachments. Thus, federal injunctive relief was justified in the instant case to fully protect the federal rights of plaintiffs and the plaintiff class.

D. The district court did not enjoin any pending state court proceedings but only the summary extrajudicial process of prejudgment attachment to which the members of the plaintiff class had been and would be subjected.

The named plaintiffs did not ask the district court to enjoin prosecution of the state court collection suit against them. They only asked for equitable relief

against the summary extrajudicial seizure of their property and that of the plaintiff class which had been, and would continue to be, effectuated without notice and without any judicial participation. Thus, the relief sought would in no way interfere with the state court proceedings, but instead was directed solely at the extrajudicial procedures authorized by the Illinois Attachment Act.[24] *Younger* and *Huffman* are, therefore, no bar to the instant case.

This conclusion is supported by three decisions of this court: *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *Lynch* this Court considered whether a Connecticut prejudgment garnishment was a proceeding in a state court within the meaning of the federal Anti-Injunction Act, 28 U.S.C. §2283. The Court noted that garnishment is instituted without judicial order. The creditor or his attorney merely inserts the appropriate wording in his writ which is then executed by the sheriff. The levy of garnishment may occur prior to the commencement of the creditor's suit. The garnishment is distinct from and independent of the suit on the underlying claim. This entire procedure is carried out and maintained without the participation of the state courts. Thus, this Court concluded that Connecticut

[24] Appellants' presentation of the issues on appeal distorts the real nature of plaintiffs' federal claim. (Appellants' Br. 2). Plaintiffs did not ask the district court to enjoin the appellants from prosecuting any proceeding against them in the Illinois courts. Plaintiffs merely requested that their property which has been attached without due procedural safeguards be returned to them and that all such attachments throughout the state be enjoined. Appellants were never enjoined from proceeding with the merits of their claim in state court.

prejudgment garnishment is an extrajudicial proceeding and an injunction against its maintenance would not be barred by §2283. *Id.* at 556.

The Illinois attachment procedure is virtually identical to Connecticut prejudgment garnishment. Attachment is initiated by a creditor or his attorney by filling in the blanks on a preprinted form and filing it in the clerk's office. The clerk of the court performs the ministerial act of stamping the papers and assigning a docket number.[25] The writ of attachment is then placed with a deputy sheriff who carries out the directions of the creditor with no judicial supervision or control. When, as in this case, property in the hands of a garnishee is attached, the attachment is effectuated before the debtor is served with process. The property itself is secured either in the hands of the garnishee or is seized and held by the sheriff, not under any court order, but as an agent of the creditor. *See, Lynch v. Household Finance Corp., supra* at 554-555. The attachment remains distinct from and independent of the suit on the underlying claim.[26] Attachment, then,

[25] While the clerk is technically an officer of the court, his duties are purely ministerial and he has no authority to exercise judicial powers. *People ex rel. Pardridge v. Windes*, 275 Ill. 108, 113 N.E. 949 (1916). *See, generally*, Ill. Rev. Stat. ch. 25, §§1 *et seq.*

[26] In *Smith v. Hodge*, 13 Ill. 2d 197, 148 N.E.2d 793 (1958), the Illinois Supreme Court held that any final order concerning an attachment could only be appealed pursuant to Illinois Supreme Court Rule 304 (formerly 50(2) of the Civil Practice Act) which specifies the procedure for appealing final judgments as to fewer than all the claims in a lawsuit. Thus the Illinois Supreme Court has indicated that like spearate counts in a complaint, attachment and the underlying claims are separate and distinct.

like Connecticut prejudgment garnishment is levied and maintained without the participation of the state courts and thus can be said to be an extrajudicial proceeding.

While *Lynch* concerned the applicability of the Anti-Injunction Act to prejudgment creditor remedies, this Court indicated in *Fuentes v. Shevin, supra,* that *Younger* would also not be a bar to an injunction against a similar extrajudicial property seizure. In that case Mrs. Fuentes' goods were replevied by a deputy sheriff pursuant to the Florida Replevin Act. The writ of replevin was issued by a court clerk without judicial order or approval and without prior notice to the plaintiff and an opportunity for a hearing. While Fuentes could have raised her constitutional attack on the Florida Act in the ensuing state court suit brought by the creditor, she chose to file a §1983 action in federal court seeking a declaration that the Act violated her due process rights and an injunction against its continued enforcement.[27] This Court did not find *Younger* to be a bar to reaching the merits of the plaintiff's claim and went on to find the Florida (and Pennsylvania) Replevin Acts to be unconstitutional. The Court noted that:

> Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future proceeding as such. *Compare, Younger v. Harris*, 401 U.S. 37. Rather they challenged only the *summary extrajudicial process of prejudgment seizure of property* to which they had already been subjected. *Id.* at 71 n.3 (emphasis added).

Likewise, the plaintiffs in this case did not seek any declaratory or injunctive relief against the pending state

[27]The sequence of events in *Fuentes* virtually parallels the case at bar.

court collection suit, but only challenged the "summary extrajudicial process" of prejudgment attachment.

Gerstein v. Pugh, supra, concerned the constitutionality of a Florida procedure whereby prosecutors charged all non-capital offenses by information without a prior preliminary hearing or other judicial proceeding. The only opportunity to challenge the probable cause for detention prior to trial was by a preliminary hearing after thirty days or at arraignment which was often delayed for over a month. *Id.* at 106. As a result a person could be detained for a substantial period of time solely upon the ex parte decision of a prosecutor. Two persons arrested and charged under this procedure filed a class action in federal district court pursuant to 42 U.S.C. §1983 claiming a constitutional right to a probable cause hearing prior to extended detention and requesting declaratory and injunctive relief. The federal plaintiffs presumably could have raised their federal claim in a motion before the state court. Before reaching its decision on the merits this Court agreed with the district court that the federal claim was not barred by *Younger*. The Court reasoned as follows:

> The injunction was not directed at the state prosecution as such, but only at the legality of pretrial detention without a judicial hearing, a issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. *Id.* at 108 n.9.

The Court then found the Florida procedures to be constitutionally deficient since there were no judicial determinations of probable cause for an extended restraint of liberty after arrest.[28]

[28]The same result was reached in *Conover v. Montemuro*, 417 F.2d 1073, 1082 (3rd Cir. 1972), *cited with approval in Gerstein* at 108 n.9.

While the instant case concerns prejudgment detention of property rather than pre-trial restraint of personal liberty, it is clearly analogous to *Gerstein*. Under the Attachment Act seizure of property is initiated upon the ex parte decision of the creditor without any judicial control or supervision. There is no requirement for a post-seizure hearing before a judge to determine whether the seizure was justified. While the debtor may request a hearing on the attachment he has no absolute right to an immediate post-seizure hearing prior to the return date, and in the instant case that hearing was delayed for an additional thirty days. The legality of the attachment itself cannot be raised in defense of the creditor's underlying claim. As in *Gerstein*, the federal injunction was not directed at the state court proceedings as such "but only at the legality of pretrial detention without a hearing." *Id.*

The nature of the relief granted by the district court in *Lynch, Fuentes, Gerstein* and the present case stands in stark contrast to the federal injunctions vacated by this court in *Younger* and *Huffman*. In *Younger* the district court enjoined the district attorney from further prosecution of the pending criminal action. 401 U.S. at 40. In *Huffman* the district court enjoined execution of a state court judgment that had already been entered on the merits of the state's claim. 420 U.S. at 599.[29] In the present case the district court did not "annul the results of a state trial," *Huffman* at 609, nor did it prevent the parties or the court from proceeding with

[29]In *Sosna v. Iowa*, where this court raised *sua sponte* the *Younger* issue but allowed the parties to waive it, the appellant had sought federal relief after an adverse ruling by the state trial court on the merits of her claim. 419 U.S. 393, 396 n.3 (1975).

the trial on the appellants' money claim. Indeed, as in *Lynch, Fuentes*, and *Gerstein*, the state claim and the federal claim are mutually exclusive and the trial of the former can proceed totally unencumbered by any resolution of the latter.[30]

Any claim of federal interference with the state proceedings must be viewed in light of the actual response of the appellants and the state court to the federal suit. The federal court never enjoined the appellants or the state court from proceeding with the state trial. Appellants were always free to proceed with their civil claim which could have been resolved long before the federal injunction was issued. Instead, appellants voluntarily chose to stay their state suit pending resolution of the federal litigation. Furthermore, appellants ultimately dismissed their state claim although nothing in the federal court order required them to do so.[31] Thus the appellants' claim that the district court's injunction was an "embarrassment" to state executive functions (Appellants' Br. 10) and that it cut short the state proceedings (Appellants' Br. 20)

[30]This factor distinguishes the present case from *Perez v. Ledesma*, 401 U.S. 82 (1971) where this Court found that the suppression of evidence in a pending state criminal prosecution by a federal court is as disruptive of the state criminal process as an injunction against the entire proceedings and therefore is barred by *Younger*. In the instant case the federal court did not rule on any issue which could have been raised as a defense to the money claim and the federal injunction would have had no effect whatsoever on the conduct of the state litigation. This factor, among others, also distinguishes this case from *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir.) *application for a stay denied*, 409 U.S. 1201 (1972).

[31]Even though the federal court ordered a release of the attached property, under the Attachment Act the suit could have proceeded as if commenced by summons (§27). (A. 44.)

cannot be taken seriously in light of the appellants' own failure to press their state suit to its conclusion.

The state court's own perception of the federal suit must also be taken into account when determining whether its interest in the pending litigation had been respected. The state court was surely aware of the federal suit and yet it allowed appellants to stay the state suit pending the resolution of the federal litigation. Had the state court viewed the federal suit as an interference with its legitimate functions or as a negative reflection on its abilities, it surely could have required the parties to proceed with the state suit. Yet, without any federal stay of the state suit, the state court deferred to the federal court and postponed any litigation of the state claim until after the federal court had resolved the federal issues.

Finally, the federal suit did not result in a duplication of legal proceedings. *See, Huffman* at 602-604. There was never any judicial participation of any kind in the attachment. Thus, if the debtor chooses to raise the constitutionality of the attachment in federal rather than state court, he is not duplicating any pending or completed proceedings. The suit on the merits will proceed to judgment in the state court regardless of whether the attachment is released by a federal court or by the state court itself.

In summary, owing to the extrajudicial nature of prejudgment attachment in Illinois, the federal district court was able to vindicate the constitutional rights of the plaintiff class while fully respecting the interest of the state courts and the requirements of our federal system.

E. The traditional policy against federal interference with state criminal prosecutions does not bar federal relief against prejudgment attachment in Illinois which is neither a criminal proceeding nor in any way related to the state's criminal laws.

Younger rested, in part, upon "the traditional reluctance of courts of equity, even in a unitary system, to interfere with a criminal prosecution." *Huffman*, 420 U.S. at 604. In *Huffman* the Court found that this element of *Younger* was equally applicable to a state public nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Id.* at 604. This Court characterized the state proceeding as one "in aid of and closely related to criminal statutes which prohibit dissemination of obscene materials" and found that the district court's injunction "disrupted (the) state's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws." *Id.*

This element of *Younger*, which was the Court's primary basis for vacating the district court injunction in *Huffman*, is not present in the instant case. Prejudgment attachment in Illinois is simply a general creditor's remedy designed to facilitate collection of a possible judgment on the creditor's alleged claim. Attachment can be initiated by any party, public or private, for any cause of action sounding in contract or tort. As it is written the statute is not in aid of or closely related to any criminal statute nor are the interests embodied in the Attachment Act in any way related to those interests underlying Illinois' criminal laws.

In applying *Younger* principles to state civil proceedings numerous lower federal courts have drawn a similar distinction between "true" civil proceedings and those which are integrally related to a state's enforcement of its criminal laws. The Fifth Circuit has consistently applied *Younger* principles only in the latter case. *See, Palaio v. McAuliffe*, 466 F.2d 1230, 1232-1233 (5th Cir. 1972); *Duke v. Texas*, 477 F.2d 244, 250-251 (5th Cir. 1973); *Polk v. State Bar of Texas*, 480 F.2d 998 (5th Cir. 1973). The district court for the Northern District of Texas followed the lead of its court of appeals in a case remanded to it by this Court for reconsideration in light of *Younger*, finding that *Younger* did not prevent it from enjoining state condemnation proceedings. *Joiner v. City of Dallas*, 380 F.Supp. 754 (N.D. Tex.), *aff'd mem.*, 419 U.S. 1042, *rehearing denied*, 419 U.S. 1132 (1974). Other federal courts have recently refused to apply *Younger* and *Huffman* to strictly civil proceedings. *See, Vail v. Quinlan*, 406 F.Supp. 951 (S.D. N.Y. 1976), *prob. juris. noted* ____ U.S. ____ (No. 75-1397, June 21, 1976) (civil contempt); *Lessard v. Schmidt*, 413 F.Supp. 1318 (E.D. Wisc. 1976) *on remand for further reconsideration in light of Huffman from*, 421 U.S. 957 (1975) (civil commitment); *Doe v. Maher*, 414 F.Supp. 1368 (D. Conn. 1976) *on remand for further consideration in light of Younger and Huffman from*, 422 U.S. 391 (1976) (civil contempt); *United States General, Inc. v. Arndt*, ____ F.Supp. ____ (No. 75-C-204, E.D. Wisc. August 4, 1976) (Wisconsin attachment statute).

In *United States General, Inc. v. Arndt, supra,* a three-judge district court found that *Huffman* did not prevent it from examining the constitutionality of a

Wisconsin prejudgment attachment statute which resembles the Illinois procedure in many respects. The court reasoned as follows:

> The Wisconsin attachment statute presently before us is designed to aid private creditors and potential creditors in the ultimate collection of their alleged debts. No section of the Wisconsin Criminal Code is directly implicated or paralleled by the attachment device. Thus, this Wisconsin statute is undoubtedly more purely civil and private than the Ohio nuisance proceeding which the Court in *Huffman* effectively characterized as quasi-criminal. Our intervention here does not contain the element of federal interference with the State's legitimate interest in regulating the primary conduct of its citizens which concerned the Huffman court. *Id.*, slip opinion at 7-8.

This sound reasoning is equally applicable to the instant case.

In spite of the above considerations appellants contend that *Huffman* is a bar to the instant action since the State of Illinois was the plaintiff in the pending attachment suit and the proceeding was in aid of a statute which authorizes civil and criminal actions in public assistance fraud cases. (Appellants' Br. 13-14.) This contention leads to the unwarranted conclusion that the nature of the interests embodied in a state statute can vary according to the party who utilizes its provisions. While in *Huffman* it was significant that the state was a party to the nuisance proceedings, as the court below recognized, the Ohio statute gave the state an exclusive right to carry out its provisions. 405 F.Supp. at 760. The appellants, on the other hand, proceeded under a general civil statute which allows any "creditor" to have an attachment for any money claim.

The purpose of the pendant state collection suit is also irrelevant here since the federal court did not interfere with that proceeding. The appellants have always been free to proceed with their civil claim or to file criminal charges if they so desire.

Furthermore, it must be kept in mind that the district court certified a plaintiffs' class consisting of "all persons who now have or may have their property attached upon a creditor's allegation of fraudulent conduct pursuant to the Illinois Attachment Act, Ill.Rev.Stat., ch. 11, §1, Parts sixth through ninth." Clearly there are numerous persons in this class who have been subjected to attachments by private creditors for ordinary civil debts. The existence of this plaintiff class underscores the general civil nature of the attachment proceeding.

F. Because the Illinois Attachment Act is flagrantly and patently unconstitutional, the federal court properly enjoined its execution.

Federal court interference is allowed, even with state criminal prosecutions, where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Huffman* at 611; *Younger* at 54-55. The court below concluded that the instant case falls within this exception to the normal rule against federal non-interference. 405 F.Supp. at 760. This conclusion was reached after careful consideration of this Court's recent decisions on summary creditor remedies. *Id.* at

760-765. The district court found that the Act fails to provide either prior notice and hearing or other procedural safeguards which this Court has now made clear must be present to protect debtors from hasty and wrongful seizure of their property.

In *Huffman* this Court expressed the view that the Ohio public nuisance statute could not be characterized as flagrantly and patently unconstitutional since the Supreme Court of Ohio had subsequently construed that statute in a manner which avoided the constitutional difficulties which had concerned the district court.[32] 402 U.S. at 611-612. In contrast, the Attachment Act is incapable of any construction which would eliminate the constitutional questions raised herein. As will be seen in Section III, *infra*, appellants' claim that the Act is capable of judicial narrowing is totally without merit. (Appellants' Br. 20, 24.) The Attachment Act is constitutionally infirm in "whatever manner and against whomever an effort might be made to apply it." It is so broadly drawn that it could not be interpreted to be limited to those facts or situations which might pass constitutional muster under a more narrowly circumscribed statute. This factor along with the others set forth above clearly justified federal injunctive relief in the instant case.

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[32]The fact that the constitutional issue in *Huffman* involved a statute which was capable of judicial narrowing was an additional reason that this Court felt that the state appellate courts should have been given the opportunity to rule on that issue. 420 U.S. at 609.

G. Conclusion.

In conclusion, the strong federal interest of providing a forum for the vindication of federal rights under §1983 was realized in this case without any interference with state judicial functions. The plaintiffs and the members of the plaintiff class raised a uniquely federal claim which was not cognizable in the pending state proceeding. The relief was necessary to prevent great and immediate irreparable injury from the operation of a patently unconstitutional statute. The federal injunction did not interfere with the state civil collection suit, nor did it disrupt the state's efforts to enforce its criminal laws. The federal litigation did not duplicate state legal proceedings nor did it in any way reflect negatively on the state court's ability to enforce constitutional principles. In light of these considerations the principles of equity, comity, and federalism were fully respected, and in fact enhanced, by the decision of the district court to hear and decide the constitutional claims presented in this case.

III.

THE ILLINOIS ATTACHMENT ACT IS PATENTLY VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In a series of cases this Court has set forth the due process requirements for various summary creditor remedies. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974);

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). In *Mitchell*, this Court eschewed any strict rule as to the requirements of due process in every instance and approved a Louisiana sequestration statute which struck a balance between the conflicting interests of the buyer and seller of secured household goods. 416 U.S. at 610. The Louisiana statute permitted a secured creditor to obtain possession of the disputed goods prior to a full adversary hearing only by presenting to a judge a petition and affidavit setting forth in factual detail the grounds for the sequestration and by filing a bond to indemnify the buyer for a wrongful seizure. *Id.* at 605-606. The buyer could obtain release of the property by filing his own bond or by immediately moving for a post-seizure hearing at which the creditor would have to prove the facts alleged in his affidavit. *Id.* at 607.

In *North Georgia*, this Court made it clear that the procedural safeguards which saved the Louisiana sequestration statute from being unconstitutional were not to be limited to the facts of *Mitchell*, but were equally applicable to a Georgia statute which authorized a pre-hearing attachment of an alleged debtor's property. The Court struck down the Georgia procedure since it neither provided a pre-seizure hearing nor did it contain two of the important procedural safeguards present in *Mitchell*, issuance of the writ by a judge upon a factually supported affidavit and the opportunity for an immediate post-seizure hearing, 419 U.S. at 606-607. Decisions of the lower federal courts, both prior to and after *North Georgia*, have generally utilized the same reasoning, requiring that state statutes authorizing pre-hearing property seizures provide, at a bare minimum, all the procedural safeguards set forth in

Mitchell. See, *e.g.*, *United States General v. Arndt*, F.Supp. (No. 75-C-204, E.D. Wisc., August 4, 1976); *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3rd Cir., 1976); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125 (8th Cir., 1975); *Bunton v. First Nat'l. Bank of Tampa*, 393 F.Supp. 793 (M.D. Fla., 1975); *Douglass Research and Chemical, Inc. v. Solomon*, 388 F.Supp. 433 (E.D. Mich., 1975); *Sugar v. Curtis Circulation Co.*, 383 F.Supp. 643 (S.D.N.Y., 1974), *rev'd. on other grounds, sub nom. Carey v. Sugar*, ____, U.S.____, 47 L.Ed.2d 587 (1976); *Garcia v. Krausse*, 380 F.Supp. 1254 (S.D.Tex., 1974) *rev'd. on other grounds*, 534 F.2d 609 (5th Cir., 1976). *See, generally, Pearson, Due Process and the Debtor: the Impact of Mitchell v. W. T. Grant*, 29 Okla. L.R. 277 (1976).

After reviewing the above decisions of this Court and examining the provisions of the Illinois Attachment Act, the court below found that the Act provided neither a pre-seizure hearing, nor the alternative safeguards of *Mitchell*. 405 F.Supp. at 762. Specifically, the Court found the Illinois Act lacking three crucial safeguards which were present in the Louisiana sequestration statute upheld in *Mitchell*. First, the Illinois Act does not require the creditor to set out specific facts in his affidavit which would entitle him to relief, but authorizes a writ to issue upon conclusory allegations in verbatim statutory language coupled with certain procedural information. Second, a creditor need not present a factual affidavit to a judge for determination of whether a writ should issue, but instead a writ will automatically issue from the clerk of the court who has no authority to determine the factual sufficiency of the affidavit. Third, the Act does not provide for an immediate post-seizure hearing, but

only a hearing on application by the debtor at some uncertain time in the future to be set at the convenience of the court. Thus, the court concluded that the Illinois Act is "on its face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution." *Id.*

Although appellants apparently agree with the district court's findings as to at least two of the defects in the Act–issuance of the writ by a clerk and lack of an immediate post-seizure hearing (Appellants' Br. 30-31)–they nevertheless contend that the district court did not properly apply *Mitchell* to the instant case and that the Illinois procedures closely parallel those of the Louisiana sequestration statute. (Appellants' Br. 24-25.) As to the first contention, it is clear that the district court's interpretation of *Mitchell* is in line with this Court's application of that case in *North Georgia* and with the numerous other federal courts cited above. As to the second contention, a comparison of the Louisiana statute with the Illinois Act shows that appellants' argument is without merit.

First, it should be kept in mind that the Louisiana statute authorized sequestration of specific property in which the creditor claimed "the ownership or right to possession . . . or a mortgage, lien, or privilege thereon," *Mitchell, supra* at 623. In *Mitchell*, it was undisputed that the creditor had a vendor's lien on the sequestered property, and that he was entitled to immediate possession if the buyer defaulted on his installment contract. *Id.* at 603. In contrast, the Illinois attachment creditor need not have nor allege any current lien, mortgage, or other legally cognizable interest in the property subject to attachment. Instead, the creditor has a virtually unlimited power to initiate a seizure by

the sheriff of any and all goods of an alleged debtor to be held for satisfaction of a possible future judgment. While the existence of a secured interest in the disputed property may not be a constitutional requirement for dispensing with a pre-seizure hearing, the absence of any present legal interest in attached property must be taken into account when determining whether there are adequate alternative safeguards to protect a debtor from a wrongful deprivation of his unencumbered property rights. Indeed, this Court has pointed out that a secured creditor's own interest in avoiding an interruption of payments on his installment contract contributes to minimize the risk that he will initiate a wrongful sequestration. *Id.* at 610. There is no similar safeguard in the present situation where the attachment creditor's interest is served by immediately seizing as much of the debtor's property as he believes is necessary to satisfy his alleged claim.[33] Under such circumstances the procedural safeguards which protect an installment buyer of household goods from an unwarranted sequestration must at a bare minimum be present to protect an attachment debtor from an unlimited seizure of property in which he has an undisputed possessory right.

Appellants assert that the Illinois attachment creditor, like the seller in *Mitchell*, must file an affidavit which supports the grounds for attachment with specific facts (Appellants' Br. 28). The facts of the

[33]The value of the property which can be attached is not limited by the Act. Under §6 the creditor may direct the sheriff to attach specific property which need not be limited in value to the amount of the claim. The bond provision does not protect the debtor against an excessive attachment since the creditor need only file a bond in twice the amount of the claim.

instant case belie appellants' contention. The appellants obtained their attachment by filing an affidavit on a preprinted form supplied by the clerk of the circuit court which set forth the grounds for attachment in verbatim statutory language (A. 14). The form of the affidavit utilized is specifically authorized by the Act (§2A, A. 30). The appellants merely filled in the proper blank spaces selecting the ground that the plaintiffs "within two years preceding the filing of this affidavit fraudulently concealed or disposed of property so as to hinder or delay their creditors" (A. 17-18). Neither in the affidavit nor the complaint filed therewith did the appellants set forth the specific factual elements of fraud which must be pleaded in Illinois. *See, Tate v. Jackson*, 22 Ill. App.2d 471, 161 N.E.2d 156 (1959); *Attwood Vacuum Machine Co. v. Continental Casualty Co.*, 107 Ill.App.2d 248, 246 N.E.2d 882 (1969).[34] Lacking specifically pleaded facts a judicial officer would have no basis on which to evaluate whether a writ should issue but could only determine that procedural requirements were met. Factual allegations are also important, especially in a complex claim such as fraud, to apprise the debtor of the specific facts he will have to rebut at any subsequent post-seizure hearing. In the instant case an effective defense could only have been carried out after discovery, further prolonging the period of detention without a hearing.

[34]Even if a complaint is properly pleaded it does not satisfy the requirement of factual support for issuance of the writ since it need not be filed until after the writ has been issued (§25). (A. 43.) In contrast the creditor in *Mitchell* was required to set forth his factual grounds in a verified petition or accompanying affidavit before the writ would issue. *Mitchell, supra,* at 422.

Appellants concede that in contract actions such as the present case, the writ is issued by a clerk without judicial participation but attempts to minimize this constitutional defect by misconstruing the reasoning in *Mitchell* (Appellants' Br. 30). In *Mitchell*, the issue of possession *pendente lite* turned on the existence of the debt, the lien, and the delinquency. This Court reasoned that "these are ordinarily uncomplicated matters that lend themselves to documentary proof" and thus initial seizure on sworn ex parte documents was appropriate. *Id.* at 609. However, these documents were examined by a judge who was required to determine whether the sworn statements constituted adequate grounds for the sequestration. *Id.* at 616 n.12. Contrary to appellants' contention that in such cases an appearance before a judge would be a mere formality (Appellants' Br. 30), the role of the judge in *Mitchell* was considered crucial. As the Court pointed out, "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for *judicial* control of the process from beginning to end." (Emphasis added.) *Id.* at 616. Furthermore, not all contract actions concern such uncomplicated matters as that involved in *Mitchell*. Fraud, for example, is made up of numerous subjective elements such as intent and scienter which are not amenable to documentary proof. *See, Mitchell, supra* at 617. In such a complex case, judicial scrutiny of the

affidavit is especially crucial in an ex parte proceeding.[35]

Appellants rightly point out that in tort actions the creditor must be examined by a judge concerning his cause of action before a writ of attachment may issue. (Appellants' Br. 29.) However, as noted by the district court, this provision is "limited only to the question of potential damages and determination of the limit on the amount of property to be attached. The judge is not required to evaluate the legal sufficiency of sworn facts as was the case in *Mitchell*." 405 F.Supp. at 762. This interpretation is supported by the clear wording of the Act. The judge examines the creditor concerning the "cause of action" not the grounds for attachment and thereupon endorses upon the affidavit "the amount of damages for which the writ shall issue." Thereafter the clerk, not the judge, issues the writ upon filing of the

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[35] Mr. Justice Powell has suggested that due process does not require a writ of garnishment to be issued by a judicial officer as long as the factual basis of the need for the remedy be established before a neutral officer such as a court clerk. *North Georgia* at 611 n.3. Only one lower federal court has approved a summary creditor procedure where the writ is issued by a clerk, but in that case the clerk had certain judicial powers and could evaluate whether the factual allegations in the affidavit justify the summary remedy. *Hutchison v. Bank of North Carolina*, 392 F.Supp. 888 (N.D. N.C., 1975). The clerk in Illinois, however, is only a ministerial functionary (see *infra* n.17) and he has no power to evaluate the legal sufficiency of the creditor's affidavit. In fact, the clerks in the circuit court of Cook County rarely examine the content of papers filed with them and it is up to opposing counsel to raise any deficiencies therein by motion. In complicated matters such as fraud, a clerk would certainly be unable to determine whether the proper factual elements have been pleaded.

properly endorsed affidavit.[36] In any case the present attachment was on a contract action and prior judicial endorsement of damages was not obtained.[37]

Finally, and most significantly, the Attachment Act contains no express provision for an immediate post-seizure hearing. Since the creditor can set the return date ten to sixty days from the issuance of the writ, the first scheduled hearing at which the debtor can attack the attachment can occur anywhere within a

[36]The district court's interpretation is also supported by the history of this provision. The previous Act of 1874 provided simply that "a creditor may have an attachment against the property of his debtor." Ill.Rev.Stat. (1874) ch. 11, §1. The courts generally interpreted this provision to be limited to contract actions for liquidated damages. *See, 3 Illinois Law and Practice 566.* The Act was amended in 1935 and specifically authorized attachment for tort actions and for unliquidated damages. Ill. laws (1935) at 210. The provision for prior judicial endorsement in tort actions was added to §2 at this time apparently to resolve the problem of how to set the amount of bond where there was no fixed liquidated damage claim. *See*, Note, *Amendment to Illinois Attachment Act*, 14 *Chi.Kent L.Rev*. 64, 65 (1935). There is nothing in the history of the Act or case law to indicate that prior judicial evaluation of the legal sufficiency of the affidavit be made in tort actions as opposed to contract actions, nor does logic suggest such a distinction.

[37]Appellants raise for the first time the possibility that their claim sounds in tort and therefore the writ might have been quashed in state court since the affidavit had not been endorsed by a judge. (A. 30 n.5) Appellants fail to note, however, that §28 of the Act provides that no writ of attachment shall be quashed nor property taken thereto returned because of an insufficiency in the original affidavit if the creditor files a proper affidavit within such time and manner as the court directs. (A. 44.) Appellants could have simply asked for leave to file an amended affidavit, signed by the judge, and the attachment would have remained intact.

fifty day period depending upon which date the creditor chooses. Furthermore, the Act does not require a hearing on the return date and thus the debtor's first opportunity to move for dissolution of the attachment may be well after that date. In the instant case the first hearing date was set for thirty days after the attachment and forty-two days after service of the writ.

Appellants concede that the first opportunity for a post-seizure hearing may not occur until sixty days after the attachment. (Appellants' Br. 31.) Appellants contend however that a hearing within sixty days is reasonable, given the requirements of modern litigation. While sixty days might be considered early relative to the time civil litigants must normally wait for a hearing, it certainly does not satisfy the requirement of an *immediate* hearing which cuts to a *bare minimum* the length of an ex parte seizure. *Mitchell, supra* at 610. And certainly such a lengthy deprivation cannot be considered reasonable in light of the virtually unlimited power of the creditor to seize any and all goods of a debtor. Finally, contrary to appellants' contention (Appellants' Br. 31) there is no provision in the Attachment Act or in the Illinois Civil Procedure Act which would allow the debtor to advance the hearing date or move to quash prior to the return date. *See, Hecht v. Feldman*, 153 Ill. 390, 398 39 N.E. 121 (1894). The date of an ultimate hearing on the attachment issue is totally up to the discretion of the court. Under these circumstances an *express* provision for an *immediate* hearing is necessary for the proper protection of the debtor's interests.

In sum, the Illinois Attachment Act authorizes a creditor with any kind of money claim to attach another's property in which the creditor has no legally

cognizable interest, merely by filing an affidavit containing conclusory allegations with a ministerial court officer. Through this procedure a debtor can be deprived of his property for at least sixty days or possibly for a longer period where, as in Cook County, a hearing is not granted on the return date. The possible impact on the debtor of such deprivation can be seen from the affidavit of the plaintiffs in the instant case. (A. 24-25.) *See* discussion *supra* at 21. While the attachment did not interrupt the plaintiffs' basic source of income as in *Sniadach*, they were denied access to savings from their wages at a time when they most needed them. Under these circumstances a creditor has great leverage for favorable settlement of his claim, especially in the case of a low-income debtor who may be unable to obtain a bond for the release of his property.

There can be no question, then, that in light of the contingent nature of the creditor's interest in the property, and most importantly, the lack of important procedural safeguards to protect the debtor against a wrongful and lengthy seizure of his property, the Illinois Attachment Act must be seen as patently unconstitutional.

CONCLUSION

For the foregoing reasons appellees Juan and Maria Hernandez respectfully pray that the judgment of the district court be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1407

JAMES TRAINOR, etc., et al.,

Appellants,

v.

JUAN HERNANDEZ, et al., etc.,

Appellees.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division

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BRIEF OF APPELLEES JUAN HERNANDEZ AND MARIA HERNANDEZ

ERRATA

Page vi, United States General, Inc. v. Arndt, 417 F. Supp. 1300 (E.D. Wisc., 1976).... 21,44,50

Page 11, second paragraph, line 5,
...prejudgment attachment in Illinois is

Page 14, second paragraph, line 7,
as in the instant case,...

Page 20, Note 8, line 4,
at 15.

Page 23, first paragraph, line 3,
authorized §1983 plaintiff and defendant class actions

Page 45, first paragraph, last line of quotation,
Huffman court. Id. at 1309

Page 55, Note 35, line 11,
only a ministerial functionary (see infra n.25)...

Page 58, first paragraph, line 9,
... See discussion supra at 24.